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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 173

JOSEPH T. LYKES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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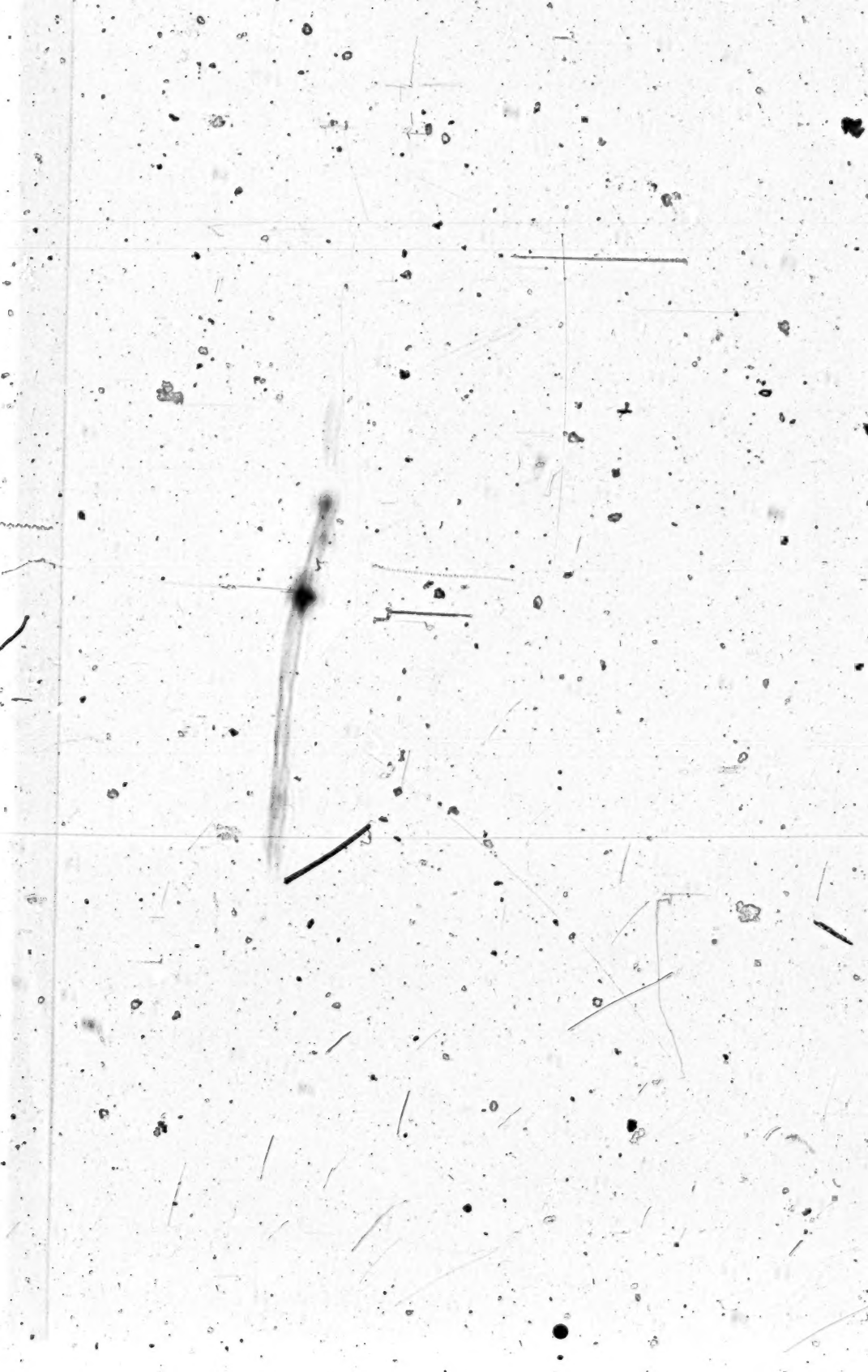

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To the Honorable the Justices of the Supreme Court of the United States:

J. T. Lykes, petitioner in this cause, respectfully petitions the Court for re-hearing, and presents the following grounds in support of his petition:

I. *Importance of the case.* This case was set for argument on the summary docket and argued on November 29-30, 1951. The case in its superficial aspects presented only the question of the disallowance or allowance of certain legal fees to this particular petitioner-taxpayer under Internal Revenue Code, Section 23 (a) (2).

Actually the case has an importance far beyond the confines of that limited aspect; and it involves questions of such moment as to compel the most thorough

reconsideration by this Court of its entire attitude toward taxing statutes and administrative rulings of the Internal Revenue Service.

Can taxpayers rely on the obvious and literal meaning of taxing statutes, reasonably construed; or must they be bound by restrictive and antagonistic interpretations of those statutes by the Commissioner?

Never have we had a greater need for a realistic and reasonable interpretation of taxing statutes. Tax rates are drastically high. A taxing theory which does not accept the proposition that Congress intends to tax essentially "net income" can be an instrument for killing the goose (an advised term) which lays the government's golden eggs.

The majority decision in this case appears to accept the proposition that deduction provisions shall be interpreted in their "fair and natural meaning", and not be subject to a restrictive interpretation by this Court (p. 2); and yet that decision permits and applies a restrictive interpretation promulgated by the Commissioner in the Regulations (pp. 8-9).

We do not condone the taxpayer who utilizes the extra-legal remedy of self-help. But denied justice by the tax collecting agencies whose interpretations of taxing statutes have as their principal goal the maximum production of revenue,—and again denied justice in the courts by their tacit approval and application of these unduly restrictive interpretations of taxing statutes, it can be understood how some taxpayers might easily succumb to the transgressions of the influence peddler and the gullible (and probably underpaid) official. The pressure is too great. The stakes are too high. Relief from his Congress is too late to help him.

There is no longer any excuse for this Court to adhere to antiquated theories permitting restrictive interpretations of taxing statutes by the Commissioner. The proper, the realistic, course has been clear for some time. The argument for it is now a matter of compelling public concern.

Under these circumstances this case should receive from this Court the absolute maximum of time that the Court can spare in such additional enlightenment as counsel can offer in re-hearing on the case. Its implications in the administration of the revenue as a whole were, we consider, too important for consideration on the summary docket, and merit the fullest reconsideration by this Court.

II. *The Misapplication of Section 24 (a) (1) of the Code.* The majority opinion (pp. 4-6) determines that litigation with one's government over gift taxes results in personal, living, or family expenses, akin to those incurred in a "sport, recreation or hobby" (Regulations 111, Section 29.23(a)-15(b); H. Rep. No. 2333, 77th Congress, Second Session, 75). Probably several thousands of taxpayers can testify that they don't see the relationship; and the Regulations themselves, under the stress of court decisions, now permit the deduction of legal expenses of *income* tax controversies, regardless of the fact that the generating impulse of the income tax controversy may have been a gift. (Regulations 111, Section 23(a)-15(b)).

The plain fact is, as Mr. Justice Jackson effectively points out in his dissent, that the gift which Mr. Lykes made was not the necessary and effective cause of the gift tax controversy. Obviously we do not contend that

the gift was deductible; nor do we contend that the expense of every controversy between donors and donees over gifts would—absent other facts—necessarily be deductible (majority opinion, p. 3).

We do contend that where the Government, by virtue of an attempt to improperly and illegally swell its revenues, becomes a party to the litigation, the personal aspect ceases.

The absurdity of any other position is demonstrated by another analogy; I work, and I work for a living—therefore, any expenses incurred in connection with my work are personal or living expenses. It was my desire to live that caused the work; and, therefore, none of my expenses incurred toward that end are deductible.

It is admittedly difficult in some cases to distinguish between personal or living expenses and the deductions allowable by Section 23. But it seems clear that wherever the Government attacks a transaction—not because it is a party to it, but for the purpose of making an unwarranted extraction of revenue from it—that attack, and the defense of it, is not a purely personal transaction.

Consequently, the expense of contesting the amount of the gift tax deficiency, was not at all times attributable to the gifts, as such (majority opinion, p. 8). The magnitude of the attack in this case is important because it demonstrates an arbitrary, capricious and unwarranted effort to extract revenues by the Government. It was not a situation which the donor could have reasonably anticipated at the time he made the gifts; and, consequently, it cannot be said to have been proximately caused by the gifts, except under the assumption by this Court that taxpayers must regularly presume

that their Government does act in such an unreasonable manner. If the Court does determine that that is the situation, then truly we are in an administrative wilderness and crying for Congressional relief.

III. *The Commissioner's Regulations are not entitled to substantial weight.* We respectfully submit that this Court, having considered taxation as a practical science, should not resort to stagnant fictions in the law to support mere administrative determinations.

The proposition that Regulations are given some special force and effect by virtue of the fact that the Congress has made many amendments without revising an administrative interpretation (pp. 8-9) is an antediluvian concept of judicial laissez-faire which should be promptly ended. It has lived much too long. It is a fiction on which the Courts ought not rely in order to avoid an obligation which is peculiarly theirs. A fair and reasonable interpretation of taxing statutes is too important a judicial function to be abdicated to the tax gatherer on any such unrealistic basis.

> "[This rule] . . . is an anachronism left over from earlier days in which statutes were briefer, were seldom re-enacted or amended, and administrative interpretation was far simpler. In income tax matters, where statutes now supersede each other at the rate of a new statute at least each two years, with intervening statutes limited to new provisions and amendments, and with the Board of Tax Appeals and numerous District and Circuit Courts issuing conflicting decisions, the policy of administrative interpretation is often based on the principle of expediency. To any student of federal income taxation it is obvious that the ordinary presumption as to congressional familiarity with administrative interpretation is an archaic fiction. Rules of construction are loose and malleable and are often tantalizing obstacles to a reasonable result on the

merits. Such rules should be little more than aids in the determination of tax problems. The attitude of the courts towards the merits of the case should be the real determining factor. Obviously it may not be said in every instance that re-enactment of a statutory provision without change constitutes implied approval of existing administrative practice or that expressed in the regulations promulgated under the prior statute. To suppose that Congress must correct each mistaken construction under the penalty of otherwise incorporating it into the fabric of the statute appears unwarranted. Such a policy would require frequent revisions during years in which administrative interpretation was being put to the test by practice and litigation. Such revisions would inevitably result in a statute so detailed and specific as in turn to lead to further problems of construction.

In complex income tax statutes it is absurd to indulge in the fiction that the full import of the Commissioner's regulations and administrative practice is known to the members of Congress, burdened as they are with the necessity of formulating legislation affecting many other complicated matters. Statutes have been frequently re-enacted without any consideration given to many of the specific sections of the act, the re-enactment being concerned primarily with a revision of a limited number of sections to "close loopholes" and the addition of a few new sections. As the Supreme Court said in the case of *Helvering vs. Hallock:*

> '. . . . we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principal'."
>
> Mertens, *The Law of Federal Income Taxation*, Volume 1, § 3.24, pp. 97-98.

The pressure for revenue in recent years has led to administrative rulings and determinations designed chiefly to increase the revenues. This petitioner has

suffered from two of them: (1) an unwarranted determination of gift taxes, assumed to be correct until disproved; and (2) a ruling that expenses of litigation of all gift tax controversies, regardless of the surrounding circumstances, are personal expenses and not incurred in the management, conservation or maintenance of the property which he held for the production of income—his individual estate. Through one act he was forced to incur substantial legal expenses to conserve his estate against the government's unwarranted claim; through the other he was denied the right to be taxed on his net income from that estate after deducting the cost of protecting it. Bearing that double cross to this Court, he is told that the Court will construe Section 23(a)(2) in its "fair and natural meaning", but that, nevertheless, a restrictive interpretation of the statute made by his antagonist in the earlier case, will be given "substantial weight" because Congress has the burden of examining minutely every such regulation every time it amends the taxing statutes, a burden which Congress never has undertaken, and which it is impossible, in any practical sense, for it to undertake.

We contend that all taxing statutes should not be only fairly, but liberally, construed in favor of taxpayers under today's conditions, to the end that the *reasons* for the interpretive rules of statutory construction should persist beyond the rules themselves.

> "The basis for the rule (of strict construction) is the same as that supporting a rule of strict construction of positive revenue laws—that the burdens of taxation should be distributed equally and fairly among the members of society."

> ". . . a reasonable construction of all tax measures should be preferred. *Emphasis belongs upon the general objectives of such laws with the view to accomplishing uniformity and equality among the class of persons sought to be taxed.*"
>
> Sutherland, *Statutory Construction*, 3rd ed., §§ 6702, 6703 (emphasis supplies).

According to the rule of the majority opinion, the taxpayer who experiences an income tax controversy arising out of a gift of property has *less* taxable net income than a similarly situated taxpayer who experiences a gift tax controversy; and probably a donee conserving his property from the lien of a gift tax is also more favorably treated. This is not the equality of tax burden which generated the primary rules of statutory construction of taxing statutes.

CONCLUSION

The majority of this Court has based its decision on certain concepts of tax law which we consider are fundamentally faulty. They are, furthermore, concepts which, if applied generally to the law of taxation, will have a far-reaching effect on the administration of the revenues. We respectfully urge the Court to reconsider its decision, and pray the Court to order a re-hearing on the regular docket so that the fullest possible consideration can be given to the implications of the decision in all its aspects. We respectfully pray that the Court, on re-hearing, reverse the Court of Appeals and find for the petitioner, or remand to the District Court for complete findings of fact.

Respectfully submitted,

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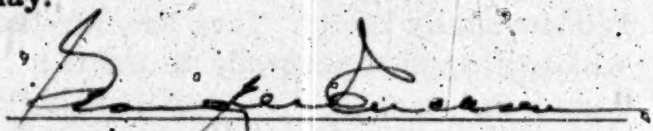
I, George W. Ericksen, of counsel for J. T. Lykes, petitioner, do hereby certify that the foregoing petition for re-hearing of this cause is presented in good faith and not for delay.



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